APPENDIX A — OPINION OF THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION III DATED AND FILED SEPTEMBER 1, 2000

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA
DIVISION III

Case Number 94,054

PEZOLD, RICHEY, CARUSO & BARKER,
a partnership of professional corporations,

Plaintiff/Appellee,

versus

CHEROKEE NATION INDUSTRIES INC., an Oklahoma corporation, CHEROKEE NATION ENTERPRISES, an Oklahoma corporation,

Defendants,

and

THE CHEROKEE NATION, a federally recognized Indian Tribe,

Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY, OKLAHOMA

Appendix A

HONORABLE GREGORY K. FRIZZELL,
TRIAL JUDGE

* * *

OPINION

Opinion by CAROL M. HANSEN, Vice-Chief Judge:

¶1 Defendant/Appellant, Cherokee Nation, seeks review of the trial court's order granting judgment against it and in favor of Plaintiff/Appellee, Pezold, Richey, Caruso & Barker (Pezold), for attorney fees as discovery sanctions. We reverse, holding Cherokee Nation's sovereign immunity protects it from a state court's exercise of inherent powers.

¶2 Pezold, a law firm, sued Cherokee Nation in state district court to recover fees arising from its representation of the tribe in certain commercial matters. Cherokee Nation specially entered its appearance and moved to dismiss, claiming sovereign immunity. The trial court denied the motion and the parties proceeded with discovery. Pezold moved to compel Cherokee Nation to produce certain documents and later sought sanctions against Cherokee Nation for discovery violations. On November 11, 1997, the trial court granted Pezold's motion for sanctions and directed it to file an application for fees and costs connected with its motion to compel, motion for sanctions, and its search for the documents Cherokee Nation failed to produce.

¶3 On May 26, 1998, the U.S. Supreme Court handed down its decision in *Kiowa Tribe of Okla. v. Manufacturing*

Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), holding Indian tribes enjoy immunity from suit on contracts, whether the contracts involve governmental or commercial activities and whether they were made on or off a reservation. Cherokee Nation again moved for dismissal based on sovereign immunity. Pezold agreed to dismissal without prejudice but asserted its right to recover under the sanction order continued. The trial court agreed and heard Pezold's application for attorney fees and costs.

¶4 On November 17, 1999, the trial court entered a judgment for Pezold against Cherokee Nation in the amount of $32,688.40 as fees and costs resulting from Cherokee Nation's discovery violations. Cherokee Nation appeals from that order, contending the trial court lacked authority to impose sanctions against it because (1) the U.S. Constitution and federal case law reserve to the federal government plenary authority over it, and (2) it possesses federal common law immunity from suit.

¶5 Pezold responds the court's inherent power to sanction abusive litigation practices is not lost simply because a case is ultimately dismissed for lack of subject matter jurisdiction, citing *Willy v. Coastal Corp.*, 503 U.S. 131, 137, 112 S.Ct. 1076, 1080, 117 L.Ed.2d 280 (1992). In *Willy*, a former employee sued his employer for wrongful discharge, and the employer removed the action to federal court. The court dismissed the action for failure to state a claim and imposed Rule 11 sanctions based on conduct in the case. On appeal, the Fifth Circuit Court of Appeals determined the district court lacked subject matter jurisdiction but upheld the sanctions award. In a second

appeal, the Fifth Circuit concluded a federal court could exercise its inherent power in imposing Rule 11 sanctions even in the absence of subject-matter jurisdiction. The U.S. Supreme Court affirmed, stating,

> A final determination of lack of subject-matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction.

503 U.S. at 137.

¶6 The facts in *Willy* did not, however, implicate sovereign immunity. In *U.S. v. Horn*, 29 F.3d 754 (1st Cir. 1994), the Court confronted the conflict between the doctrines of sovereign immunity and inherent or supervisory power. The federal district court had assessed attorney fees and costs against the United States for "egregious acts of prosecutorial misconduct" in a criminal prosecution. *Id.* at 770. The government appealed, contending sovereign immunity prohibited the award of fees and costs against it. The First Circuit agreed and reversed the award, stating,

> [W]e believe that sovereign immunity ordinarily will trump supervisory power in a head-to-head confrontation. The critical determinant is that the doctrines are of fundamentally different character: supervisory powers are discretionary and carefully circumscribed; sovereign immunity is mandatory

> and absolute. Consequently, whereas the former may be invoked in the absence of an applicable statute, the latter must be invoked in the absence of an applicable statute; and whereas the former may be tempered by a court to impose certain remedial measures and to withhold others, the latter must be applied mechanically, come what may. In other words, unlike the doctrine of supervisory power, the doctrine of sovereign immunity proceeds by fiat: if Congress has not waived the sovereign's immunity in a given context, the courts are obliged to honor that immunity.

Id. at 764.[1]

¶7 *Horn* involved the sovereign immunity of the federal government, whereas here the sovereign immunity of a tribe is invoked. However, under *Kiowa Tribe*, 523 U.S. at 754, 118 S.Ct. at 1702, we are similarly bound to honor that immunity in the absence of Congressional or tribal waiver. Therefore, we hold Cherokee Nation's sovereign immunity protects it from a state court's exercise of inherent powers.

¶8 Pezold cites *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65 (3d Cir. 1995), *Omaha Indian Tribe v. Tract I*, 933 F.2d 1462, 1471 (8th Cir. 1991), and *U.S. v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1251

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1. In 1997, Congress passed the Hyde Amendment, Pub.L. No. 105-119, to amend 18 U.S.C. §3006A, waiving sovereign immunity for attorney fees related to prosecutorial misconduct.

(9th Cir. 1988) as authority for the proposition that a court's inherent power to impose sanctions in a case in which there is ultimately no subject matter jurisdiction applies with equal force when jurisdiction is lost because of sovereign immunity. The first case involved a matter in which the Republic of Philippines was a plaintiff. The Foreign Sovereign Immunities Act, 28 U.S.C. §1602 et seq., which controls the courts' authority over foreign sovereigns, is inapplicable to federally recognized Indian tribes. In the second case the trial court dismissed the plaintiff tribe's quiet title action as a sanction for not complying with the court's orders. The tribe's sovereign immunity was not at issue. In the third case, the Ninth Circuit upheld Rule 11 sanctions against the federal government, citing other Ninth Circuit cases which viewed the sanctions as authorized against the federal government by the Federal Rules of Civil Procedure. The court's inherent powers were not at issue. None of these cases addressed the conflict between the doctrines of inherent powers and sovereign immunity, as did the First Circuit in *Horn*.

¶9 Accordingly, the trial court's order granting judgment against Cherokee Nation for attorney fees and costs as discovery sanctions is **REVERSED.**

ADAMS, J., and JOPLIN, J., concur.

APPENDIX B — JOURNAL ENTRY OF JUDGMENT OF THE DISTRICT COURT IN AND FOR TULSA COUNTY, STATE OF OKLAHOMA DATED NOVEMBER 16, 1999 AND FILED NOVEMBER 17, 1999

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY STATE OF OKLAHOMA

Case No. CJ-97-00427
(The Honorable Gregory K. Frizzell)

PEZOLD, RICHEY, CARUSO AND BARKER, a Partnership of Professional Corporations,

Plaintiff,

vs.

CHEROKEE NATION INDUSTRIES, INC., an Oklahoma Corporation, CHEROKEE NATION ENTERPRISES, an Oklahoma Corporation and CHEROKEE NATION,

Defendants,

vs.

TERRY J. BARKER,

Third-Party Defendant.

JOURNAL ENTRY OF JUDGMENT

Appendix B

The Court has for its consideration Plaintiff's Application for Attorneys' Fees filed October 16, 1997, and Plaintiff's Supplemental Application for Attorneys' Fees and Expenses filed December 2, 1998. The Court, having fully reviewed the applications, the evidentiary material supplied in support of the applications, as well as this Court's Order of September 24, 1997 (filed November 12, 1997), and being well and fully advised in the premises, hereby finds that by Order dated September 24, 1997, Plaintiff's Motion for Discovery Sanctions Against Cherokee Nation was granted. Under the terms of that Order, plaintiff was awarded all fees and costs incurred in connection with the (i) filing and prosecution of the Motion to Compel and Motion for Discovery Sanctions; and (ii) the search for the documents which Cherokee Nation failed to produce. Pursuant to the terms of that Order, plaintiff was granted leave to file an application with respect to such fees and costs. Cherokee Nation has not challenged the amount of the fees and expenses requested but contends that this Court is without jurisdiction to impose sanctions against it.

The Court further finds that the application and supplemental application are fully supported by affidavits and other evidentiary materials and that the fees and costs requested are reasonable and properly awarded pursuant to the Order granting sanctions against Cherokee Nation.

IT IS THEREFORE ORDERED that plaintiff is awarded fees and costs against Cherokee Nation in the amount of $32,688.40 as a result of Cherokee Nation's discovery violations.

Appendix B

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this case has been resolved as to all claims by and between plaintiff, and defendant, Cherokee Nation. The Court finds that there exists no just reason for delay in the entry of final judgment as to the sanction award. Therefore, Final Judgment is entered in favor of plaintiff and against Cherokee Nation as set forth in this Judgment.

DATED this 16th day of November, 1999.

s/ GREGORY K. FRIZZELL
GREGORY K. FRIZZELL
DISTRICT JUDGE

APPENDIX C — ORDER OF THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION 3 DATED SEPTEMBER 28, 2000 AND FILED SEPTEMBER 29, 2000

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF CIVIL APPEALS

DIVISION 3
September 28, 2000

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

94,054 – Pezold, Richey, Caruso & Barker, a partnership of professional corporations, Plaintiff/Appellee v. Cherokee Nation Industries Inc., an Oklahoma corporation, Cherokee Nation Enterprises, an Oklahoma corporation, Defendants, and The Cherokee Nation, a federally recognized Indian Tribe, Defendant/Appellant.

Appellee's Petition for Rehearing is *DENIED*.

* * *

DONE BY ORDER OF THE COURT OF CIVIL APPEALS IN CONFERENCE this 28th day of September, 2000.

s/ Carol M. Hansen
CAROL M. HANSEN,
Vice-Chief Judge

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF OKLAHOMA DENYING PETITION FOR CERTIORARI DATED AND FILED JANUARY 9, 2001

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, January 9, 2001

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

94,054 Pezold, Richey, Caruso & Barker v. Cherokee Nation Industries, Inc., et al.

Petition for certiorari is denied.

CONCUR: Watt, V.C.J., Hodges, Lavender, Kauger, Summers, Boudreau, JJ.

CONCURS BY REASON OF STARE DECISIS: Winchester, J.

DISSENT: Hargrave, C.J., Opala, J.

* * *

s/ Joseph M. Watt
ACTING CHIEF JUSTICE